Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.3523	)	RM - _____
of the Commission's Rules,	)	
Regarding Dismissal of Applications	)	
by Settlement in Renewal Proceedings	)	

TO: The Commission

PETITION FOR RULEMAKING

Respectfully submitted,

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SUMMARY

Petitioner seeks amendment of Section 73.3523 of the Rules governing settlement agreements in renewal proceedings to eliminate the bar upon such agreements involving the dismissal of the challenger prior to Initial Decision. The Petition argues:

(1) With reimbursement to a dismissing applicant limited to its legitimate and prudent expenses (excluding those incurred in reaching settlement), there is no potential for profit in a renewal challenge, and thus no need for the temporal bar adopted in 1989;

(2) The bar on pre-I.D. settlements harms the incumbent renewal applicants -- the very group which the rule purported to protect -- by compelling them to undergo the expense and delay of a full hearing, and to endure the concomitant "cloud" on their licenses, even where the challenger is willing to dismiss at an earlier point for reimbursement of some or all of its legitimate expenses.

(3) The temporal bar on settlements involving the dismissal of a renewal challenger is particularly perverse as to a renewal applicant lacking the resources to endure a full-fledged hearing, since its only remaining choice is to dismiss its renewal application and to negotiate a sale of its assets to the challenger or a third party, thereby bestowing "leverage" on the challenger which the rule purported to eliminate.

(4) The stated rationale for the rule's temporal bar is neither logical nor consistent with Commission actions in related proceedings following the rule's adoption.

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PETITION FOR RULEMAKING

National Capital Communications, Inc. ("NCCI"), by its attorneys, respectfully petitions the Commission to amend Section 73.3523 of its Rules (concerning the withdrawal by settlement of applications in conflict with pending broadcast renewal applications) to eliminate therefrom the bar upon such settlements prior to release of an Initial Decision.[1] In support thereof, it states as follows:

I. Statement of Interest

NCCI applied for a construction permit for a new television station in Washington, D.C., to operate on Channel 4 in September 1991, in conflict with the renewal application of NBC Subsidiary

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[1] Because the amendment here proposed is procedural in nature, it is exempt from the notice and comment requirements of the Administrative Procedure Act; 5 USC §553(b)(3)(A). Moreover, because adoption of this proposal would relieve a restriction, the Commission may make it effective immediately, as the 30-day effective date requirements of the APA do not apply; 5 USC §553(d)(3). See Amendment . . . to Conform §73.3525 to Amendment of Section 311(c)(3) of the Communications Act, 53 RR 2d 823 (1983).

(WRC-TV), Inc., for Station WRC-TV. The applications have not been designated for hearing. On May 14, 1993, NBC and NCCI filed with the Commission their Joint Petition for Approval of Agreement, seeking waiver of Section 73.3523 of the rules and approval of their settlement agreement, looking to the dismissal of NCCI's application in return for a partial reimbursement of its legitimate and prudent expenses.[2] That Joint Petition has not been acted upon.

While NCCI believes that it and NBC have presented ample justification for waiver of the current rule's bar upon consideration of settlement agreements prior to issuance of an Initial Decision, it just as firmly believes that the temporal limit of the rule lacks a logical basis, and in fact is antithetical to the very interests which the Commission was seeking to protect. Moreover, by compelling parties who desire to settle to first expend their resources (and those of the Commission) on a hearing which neither desires, merely to reach the point at which the Commission will consider a settlement agreement, the rule compels useless and wasteful activity. Entirely aside from the waste of resources of the applicants, the waste of the Commission's own increasingly scarce resources must be of serious public interest concern.

Thus, NCCI urges the Commission to reexamine the predicate and effect of the current rule, and, in the spirit of

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[2] The Joint Petition was supplemented by NCCI on June 18, 1993, to provide complete documentation concerning its expenses, and required declarations by NCCI principals.

"reinventing government," to eliminate the temporal bar upon consideration of settlement agreements in the renewal context.

II. Relief Requested

Petitioner urges that the Commission eliminate from Section 73.3523 the bar upon pre-Initial Decision settlement agreements in comparative renewal proceedings. The basis for Petitioner's request was succinctly stated, at the time of the Rule's adoption, in the **Separate Statement** of Commissioner Patricia Diaz Dennis:

> "I cannot agree, however, with the majority's decision to ban reimbursement altogether before an Initial Decision. The majority's line drawing will build perverse incentives into the renewal process. Banning reimbursement in the early stages of the proceeding will provide little or no additional deterrence, because challengers can still be reimbursed after the Initial Decision.
>
> "Nor will it significantly reduce challengers' leverage over incumbents because, even after an Initial Decision, the incumbent potentially faces a long, tortuous road ahead -- the Review Board, the Commission, and the Court of Appeals. Instead, this two-tier approach will discourage parties from reaching a voluntary, good-faith agreement at an early stage, at minimal cost to themselves and the Commission. We will thereby prevent applicants from settling their differences and ending a hearing that neither of them wants to pursue. Rather than encouraging these legitimate settlements, we may be causing parties who want to settle to endure a long, pointless hearing through to an Initial Decision."

4 FCC Rcd at 4796.

III. History of the Current Rule

Section 73.3523 of the Rules was adopted in 1989, as the culmination of an Inquiry commenced eight years earlier; see

[redacted]

Process) in BC Docket No. 81-742, 4 FCC Rcd 4780, recon den. 5 FCC Rcd 3902 (1990). The new rule prohibited payments to dismissing applicants challenging license renewals in excess of their "legitimate and prudent expenses,"[3] thus reversing the policy of the preceding seven years of permitting payment of any amount agreed upon by the parties, without regard to the dismissing applicant's expenses.[4] In addition, the new rule barred any settlement involving consideration to the dismissing applicant prior to the issuance of an Initial Decision in the comparative renewal proceeding.[5] It is to this temporal restriction upon settlements in a renewal context that the instant petition is addressed.

IV. The Premise For Barring Settlement In Comparative Renewal Proceedings Prior To Issuance of An Initial Decision Was Faulty, and Its Rationale Inconsistent

The rationale for the Rule's bar on pre-Initial Decision settlements was stated in the following terms:

> "26. . . . By prohibiting all payments in excess of legitimate and prudent expenses made anytime during a comparative hearing, we are eliminating most (sic) of the

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[3] The rule defines "legitimate and prudent expenses" more narrowly than Section 73.3525 (as to non-renewal comparative applicants), in that it does not include expenses incurred in negotiating the settlement agreement.

[4] See Western Connecticut Broadcasting Co., 88 FCC 2d 1492 (1982).

[5] However, no temporal limit was imposed upon a settlement involving dismissal of the renewal application. The perverse aspects of this asymmetry are discussed below, at page 11.

> potential profit to applicants in filing competing applications. This should virtually eliminate those applicants whose purpose in filing is to settle out for profit and generally assure that applications are being filed solely for their intended purpose -- that of acquiring a broadcast license. By banning all settlement payments through the Initial Decision stage, we are further reducing the potential for abuse. First, we are increasing the likelihood that only serious bona fide applicants will have the opportunity to settle out their competing applications. It is time-consuming and expensive to litigate an application through the Initial Decision stage. Moreover, an applicant that makes it through the Initial Decision stage has demonstrated that it is willing to develop a complete record on all pertinent hearing issues including technical issues, standard comparative issues, and any basic qualifications issues designated . . . For these reasons, we believe that an applicant's prosecution of its application through the Initial Decision stage is a persuasive indication of the bona fides of the application. Thus, restricting settlements to the post-Initial Decision stage helps ensure that settlements will be among bona fide competing applicants and incumbents only.
>
> "27. Second, we are removing the opportunity that non bona fide applicants currently have to exert undue pressure on incumbents to settle early in a comparative proceeding. Now, settlements most often occur at the beginning of the comparative process, when an incumbent still faces a long, expensive license renewal process, experiences the disadvantage of having a cloud over its license during that process, and has little information with which to evaluate challengers' applications. Under these circumstances, even a non-bona fide challenger has great leverage over an incumbent and the incumbent has tremendous economic incentives to settle. This situation is ripe for abuse."

4 FCC Rcd at 4783.

Petitioner submits that the stated rationale is internally inconsistent, and based upon erroneous premises. In seeking to eliminate a perceived residual potential for abuse even though any potential profit has been foreclosed, the bar upon pre-Initial Decision settlements punishes the very incumbent licensees it was intended to protect, by forcing an incumbent to bear the costs of "a long, expensive license renewal process"

before it can remove the "cloud over its license" through a negotiated settlement.

The quoted rationale appears to be based upon a false premise, i.e., that

> "By prohibiting all payments in excess of legitimate and prudent expenses made anytime during a comparative hearing, we are eliminating most [but not all] of the potential profit to applicants in filing competing applications." (Emphasis added).

Petitioner is unable to comprehend how a settling applicant prohibited from receiving more than its legitimate and prudent expenses in a settlement can realize a "profit" from such a settlement, whether such a settlement is achieved before or after an Initial Decision.

Indeed, in its proceeding in Docket No. 90-263, amending §73.3525 of its Rules relating to settlements in non-renewal comparative proceedings, the Commission recognized that by limiting reimbursement to legitimate expenses, it was eliminating the potential for profit and thus for abuse. That proceeding was instituted on the same day that the Memorandum Opinion and Order denying reconsideration in Docket 81-742 was adopted. Although the Notice of Proposed Rulemaking in Docket 90-263 (5 FCC Rcd 3921; 55 Fed.Reg 28919) proposed to limit settlement payments to legitimate and prudent expenses, it proposed no temporal limits upon such settlement agreements. However, the Report and Order, in addition to amending §73.3525 of the Rules to preclude payment of more than the legitimate and prudent expense of the dismissing applicant, would have barred any settlement-by-payment after the

commencement of the trial phase of the hearing; Settlement Agreement Payments, 6 FCC Rcd 85, at 86 (1990).[6]

On reconsideration of the latter **Report and Order**, however, the Commission eliminated the temporal limitation altogether, reasoning:

> "an across-the-board limitation on settlement payments to expenses is sufficient to deter speculative applications because it forecloses applicants from making a profit on settlements.*
>
> * But see . . . Prevention of Abuses of the Renewal Process, [citations omitted]"

6 FCC Rcd 2901 (1991). Thus, the Commission there acknowledged, but did not explain, the apparent inconsistency of permitting settlement of non-renewal cases at any stage of the proceedings, while precluding settlements of renewal proceedings until after an Initial Decision. More importantly, the Commission there conceded that limiting dismissing applicants to recovery of their expenses "forecloses applicants from making a profit" -- not that it only eliminates "most potential for profit," the premise for the pre-Initial Decision bar on settlements in a renewal context.

Once payment is limited to reimbursement of expenses, there is no residual "potential for abuse" which needs to be "further reduc[ed]", the Commission's justification for its bar on pre-

[6] That **Report and Order** did not acknowledge, much less discuss, the apparent inconsistency of barring settlement in renewal cases until after the hearing phase had been completed, while limiting settlement in non-renewal cases only to the period prior to commencement of the hearing.

Initial Decision settlements.[7] With the profit potential eliminated, there is no settlement-related reason for a non-bona fide applicant to apply in the first place.[8]

A second faulty premise from which the temporal bar of the Rule springs is the apparent view that the new applicant enjoys "leverage" over the incumbent in any pre-Initial Decision settlement negotiations. That view has no discernable basis in fact, and seems unduly paternalistic,[9] and at best speculative:

o The suggestion that the challenger may have some "information" advantage over the incumbent at the time of the filing of its application, thereby creating "leverage,"

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[7] Because the definition of "legitimate and prudent" expenses in §73.3523 does not include expenses incurred in reaching the settlement agreement (unlike the definition of that term in §73.3525), the dismissing applicant in a renewal context will be assured of at least some loss, even if all of its expenses of preparing and prosecuting its application are reimbursed. And because a dismissing applicant's principals may not be reimbursed for the value of their time devoted to preparation and prosecution of their application, additional economic loss is assured.

Finally, if there were any lingering concern that renewal challengers might expect their challenge to be a riskless "free ride," the Commission could consider limiting settlement payments to a specified percentage of the legitimate expenses of the dismissing applicant.

[8] In the era prior to the 1982 amendment to Section 311 of the Act, there were occasional applications filed in conflict with renewal applications which were arguably based upon advancing other objectives of the applicant. The potential for such applications exists independently of whether reimbursement is limited to expenses, or when settlement agreements may be entertained.

[9] That NBC might be the victim of "leverage" exerted by NCCI in achieving their pending settlement is not credible.

overlooks the fact that the incumbent can close any information gap rather quickly, and hardly requires an evidentiary hearing to place itself on an equal footing with the challenger in terms of competitive intelligence.[10]

- Ascribing "leverage" to an incumbent's concern for the time and expense of a hearing, the Commission ignored the facts that the challenger, too, faces the time and expense of a hearing; and that, unlike the typical incumbent, has no operating profits from which to fund its cost of litigation.
- The Commission also found evidence of "leverage" in its perception that most settlements occur "at the beginning of the comparative process." The record in Docket 81-742 does not support the proposition that most settlements in a renewal context occur at the earliest stages of the proceeding, but even if that were the case, it does not follow that the timing of such settlements is a manifestation of "leverage" exerted by the challenger upon

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[10] In its Report and Order in Docket No. 88-328, Revision of Form 301, 4 FCC Rcd 3853 (1989), adopted on the same day as the Report and Order in Docket 81-742, the Commission significantly expanded the ownership and financial information required to be contained in an initial application. In doing so, the Commission noted:

> "14. Comments in BC Docket 81-742. The commenters in BC Docket 81-742 overwhelmingly supported strengthening of filing requirements for competing applications in the license renewal context. . . . [T]hese commenters . . . asserted . . . that requiring more information will deter and uncover sham and unqualified applicants at the filing stage, thereby facilitating early settlement of applications." (Id., at 3855; emphasis added, footnotes omitted).

the incumbent. Settlement of any litigation is most efficient to the parties if accomplished earlier, rather than later. The longer litigation continues, the greater the costs to both parties, and the less economically attractive settlement becomes. This is particularly the case where (as is now the case) payment is limited to expenses, since the challenger's expenses (and thus the maximum cost of settlement to the incumbent) at an early point are relatively modest, whereas by the time both parties have incurred the costs of an evidentiary hearing through an Initial Decision, the potential savings (in terms of avoiding future costs) have diminished substantially, and the maximum permitted payment has increased dramatically.[11]

- Approval of a settlement agreement at any point in the proceedings requires a determination that the public interest would be served; 47 U.S.C. §311(d)(3)(A). The Commission's Administrative Law Judges are fully qualified to make such determinations; do so regularly in the context of non-renewal comparative proceedings; and have done so as well in renewal proceedings: See WWOR-TV, Inc., 6 FCC Rcd

[11] During the period when there was no limitation upon the amount of payment to a dismissing applicant, it was more logical that a non-bona fide applicant (i.e., one interested primarily in obtaining a large pay-off rather than prosecuting its application to a conclusion) would seek as early a settlement as possible. However, with payment limited to expenses (assuming that the incumbent is ready to reimburse the challenger's expenses at any point in the proceeding), the primary incentive of a challenger to settle early is to minimize its economic loss flowing from the time value of money, and to reduce the risk that there will be no settlement.

4350 (I.D. 1991), aff'd 7 FCC Rcd 636 (1992), aff'd sub nom. Garden State Broadcasting v. F.C.C., ___ F.2d ___ (D.C. Cir., June 29, 1993).

The principal beneficiaries of the current rule barring settlement of renewal proceedings prior to Initial Decision are the attorneys for both challenger and incumbent, who are assured of the substantial billings produced by a comparative hearing just to reach the point where settlement is an option. Surely, this was not the result intended by the Commission.

While the challenger may be somewhat disadvantaged by the current rule, it is the incumbent which bears the brunt of the cost of the pre-Initial Decision settlement prohibition,[12] since it is foreclosed from minimizing its costs of litigation and of settlement, and is forced to endure for an extended period the very "cloud" over its license which the Commission characterized as the challenger's "leverage." Moreover, because the rule does not foreclose a pre-Initial Decision settlement involving dismissal of the renewal applicant, it actually gives a challenger "leverage" where none existed before. Thus, where an incumbent faced with a challenger wishes to avoid the time and

[12] Of course, the Commission experiences a heavy drain on its own resources by forcing the prosecution of applications through an Initial Decision, despite the parties' willingness to settle earlier.

expense of a hearing,[13] it now has but a single choice -- to negotiate a "settlement" with the challenger whereby the incumbent dismisses its renewal application, and sells its physical plant to the challenger or to a third party.[14]

V. Conclusion

In sum, the "perverse incentives" predicted by Commissioner Dennis at the time of the rule's adoption are being realized. It is urged that the Commission promptly eliminate the prohibition upon pre-Initial Decision settlement of comparative renewal cases, as unnecessary to deter speculative or sham applications,

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[13] Not all incumbents enjoy the economic freedom to choose between litigating or settling. Some incumbents may not be able to afford the cost of a lengthy hearing just to reach the point where the Commission will consider a settlement agreement procuring the dismissal of the challenger. For such an incumbent, the current rule leaves but one choice -- the sale of its physical facilities to the challenger, and the dismissal of its renewal application.

[14] See, e.g., RKO General, Inc. (KFRC), 6 FCC Rcd 1808 (1991), and cases cited therein. It is recognized that the RKO settlements arose out of unique circumstances, in that the incumbent had already been found to be disqualified and thus ungrantable; but they nonetheless provide a road-map to the only form of settlement currently available to an incumbent lacking the resources to finance a hearing through an initial decision.

as punitive of incumbent licensees, and as wasteful of the Commission's limited resources.

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September 16, 1993

CERTIFICATE OF SERVICE

I, Donald E. Ward, do hereby certify that I have this 16th day of September, 1993, caused to be served by first class, United States mail, postage prepaid, copies of the foregoing "PETITION FOR RULEMAKING" to the offices of the following:

Chairman James H. Quello*
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